STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 39-81:

BUTTE TEACHERS' UNION, LOCAL NO. 332, AFT, (AFL-CIO), Complainant, - vs - BUTTE SCHOOL DISTRICT NO. 1, Defendant.	FINAL ORDER

* *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on May 11, 1982.

Exceptions to the Findings of Fact, Conclusion of Law and Recommended Order were filed by J. Brian Tierney, Attorney for Complainant, on May 31, 1982.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Complainant to Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board.

DATED this 9th day of July, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

STATE OF MONTANA

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IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 39-81:

BUTTE TEACHERS' UNION, LOCAL NO. 332, AFT (AFL-CIO) Complainant, vs. BUTTE SCHOOL DISTRICT NO. 1 Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

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On October 20, 1981 Complainant filed this unfair labor practice charge against the School District alleging it had violated 39-31-201 and 401 MCA when it required that teachers accompany their students outside for recess. The District denied any violation and we set the matter for hearing under authority of 39-31-406 MCA. A formal hearing was conducted in Butte on January 19, 1982. Mr. J. Brian Tierney represented the Complainant, Mr. Donald C. Robinson represented the Defendant. The case was submitted when the last brief was filed on March 10, 1982 as ordered.

ISSUE

The primary question raised here is whether the School District violated any of the rights of the Complainant teachers protected by 39-31-401 MCA. The specific issue is whether the action of the Assistant Superintendent of Schools, in requiring that elementary teachers accompany their students at recess, amounted to a retaliation against them because they had earlier filed a contract grievance and won an arbitration award.

FINDINGS OF FACT

Based on the evidence on the record including the sworn testimony of witnesses I find as follows:

1. The Complainant, Butte Teachers Union, is recognized by the Defendant, Butte School District No. 1, as the exclusive representative of teachers employed by the District. The parties have a collective bargaining agreement which covers the terms of wages, hours and other conditions of employment of the teachers and provides a procedure for processing grievances.

2. The contract has provided for a certain amount of preparation time for intermediate grade (4th, 5th, and 6th) teachers since 1973. The number of minutes has been increased through negotiations over the years, however, from 1973 until 1979, 120 minutes per week were provided.

3. The School District had a policy for a number of years which permitted the intermediate grade teachers to rotate their recess duty. Under that policy a teacher could be expected to be assigned to be outside in supervision of the students about one day (for a total of about 30 minutes) each week. The time a teacher actually spent at recess with the students was not counted as preparation time; however, the time not spent supervising students at recess was counted as preparation time.

4. Over a number of years the subject of equality of preparation time for intermediate teachers continued to be a subject of discussion and debate between teachers and administration officials. In January of 1978 the Union filed a grievance with the Superintendent over preparation time. It was later resolved through negotiations.

5. During a pre-negotiation session for the 1979-1982 contract the Superintendent told members of the Union negotiating committee that if they pursued the recess time-preparation time issue the administration's stand would be that teachers would be put outside during all their students' recess

times.

6. The 1979-82 collective bargaining agreement provided for 180 minutes per week of preparation time during 1979-80 and 225 minutes per week thereafter.

7. Because of the negotiated increase in preparation time the District, beginning during the fall of 1979, began to count the time not spent supervising students at recess as preparation time. The teachers used the time when they were not required to be on the playground with the students in various ways. Some used it as a time to relax and take a break, others used it to perform student instruction related functions. At times they were assigned specific duties such as shelving books.

8. On December 3, 1979 assistant Superintendent Dennehy issued a memorandum to all principals in the District on the subject of the recess program. He pointed out recent accidents and lawsuits and suggested that injuries to students was sufficient cause to change the policy. He referred to the example of one of the principals, who had each teacher take his class outside each morning and afternoon as the teacher saw fit, and suggested such approach was best to prevent accidents.

9. On December 18, 1979 Mr. Dennehy issued another memorandum to principals concerning playground rules. The rules were directed toward safety on the playground and addressed supervision and student conduct.

10. Although the Assistant Superintendent believed it to be in the best interest of the students' safety and the employer's desire to avoid lawsuits, he did not change the recess rotation policy because, given the fixed six-hour teacher day, he believed the preparation time obligation had to be met through utilization of non-duty recess time.

11. On March 20, 1980 certain intermediate grade teachers filed a grievance under the terms of the collective bargaining agreement. The issue raised by the grievance was whether the non-duty time spent during recess under the District's rotation system could be counted as preparation time. The issue was eventually placed before an arbitrator who ruled on April 5, 1980 that the District could not count the time as preparation time. On July 10, 1981 a monetary award of $900.00 each was given to the aggrieved teachers for preparation time they had lost. On appeal the District Court upheld the arbitrator's decision.

12. On July 30, 1981 Mr. Dennehy issued a memorandum changing the recess rotation policy. He directed that each teacher accompany his class to the playground and supervise the students during recess. He further directed that teachers not cover classes for each other. During discussions with principals subsequent to issuing the memorandum Mr. Dennehy made it clear that the policy was flexible and that teachers' personal needs could be accommodated.

13. The new policy resulted in increased safety during recess because there were more teachers to watch the students. It also made scheduling easier.

14. The teachers do not dispute the right of the District to assign them duties during their work day. Even during the recess rotation period they, on occasion, were given assignments to accomplish during their non-duty recess time.

15. If the rotation system had not been changed after the arbitrator issued his award, the non-duty time previously counted as preparation time would have become non-working or free time, neither of which is provided for in the collective bargaining agreement or by past practice.

16. The July 30, 1981 memorandum was not directed soley at the teachers who filed the grievance, but rather at all the elementary grade teachers.

17. The teachers believed the new policy was in retaliation of their grievance. One of them expressed that belief to the Assistant Superintendent on September 9, 1981. Mr. Dennehy, in response to the allegation, issued a memorandum explaining that his motive was not retaliatory but primarily one of safety and, secondarily, one of economics. He stated that at one time the practice had been for teachers to take their students to recess each day.

18. Two lawsuits were filed in recent years against the District because of accidents on playgrounds, each alleged negligence on the part of the District for failure to provide supervision of the students.

All proposed findings of fact which are inconsistent with the above findings are hereby rejected on the grounds they are not supported by the evidence on the record as a whole.

ANALYSIS

The pertinent parts of Title 39, Chapter 31, MCA with which we are concerned here are sections 39-31-201 and 39-31-401(1), they provide as follows:

> 39-31-201 Public employees shall have and shall be protected in the exercise of the right. . .to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.
>
> 39-31-401 It is an unfair labor practice for a public employer to:
> (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;
>
> . . .

The same prohibition against employer interference with protected employee activities is found in sections 7 and 8(a)(1) of the National Labor Relations Act. Because of the

similar language of the NLRA and the Montana Collective Bargaining for Public Employees Act, the Board of Personnel Appeals looks to National Labor Relations Board and federal court precedent for guidance in this and other areas of labor law. The Montana Supreme Court has held that private sector precedents are relevant in interpreting the state Act when its language and that of the federal Act are similar. State Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 765 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City of Billings, 171 Mont. 20, 555 P.2d 57, 93 LRRM 2753 (1976).

There is no question that the employees who filed the contract grievance, which ultimately resulted in the arbitrator's award, were engaged in protected activities. The NLRB has generally held that the discharge or disciplining of employees for filing or processing grievances is a violation of section 8(a)(1). Ernst Steel Corp., 212 NLRB 32, 87 LRRM 1508 (1974); Southwestern Bell Telephone, 212 NLRB 10, 87 LRRM 1446 (1974). In the instant case no such disciplinary action was taken by the School District. The question is whether the District took any action, as a result of the teachers' filing the grievance, that had an adverse effect upon their rights protected by 39-31-401(1) MCA. There was no allegation made and no evidence offered to support a finding of a violation of 39-21-401(3) MCA. In fact, the evidence on the record shows there was no discrimination by the employer.

In Lane v. NLRB, 415 F.2d 1208 (D.C. Cir. 1969), 72 LRRM 2441, the circuit court made an analysis of the U.S. Supreme Court's approach to section 8(a)(1) and 8(a)(3) cases. After reviewing both NLRB v. Great Dane Trailers, 388 U.S. 26, 65 LRRM 2465 (1967) and NLRB v. Fleetwood

Trailer Co., 389 U.S. 375, 66 LRRM 2737 (1967), the opinion stated, "In both Great Dane and Fleetwood, once the union has shown some adverse effect upon the rights of the employees, the employer must bear the burden of establishing the legitimate and substantial business justifications for his conduct." There is nothing on the record in this case to support a conclusion that the employer took any action which adversely affected the rights of the teachers under 39-31-201 MCA. No disciplinary or other measures were imposed against the teachers who filed the grievance. The coverage of employee protected rights under Section 201 cannot reasonably be broadened to include the right to duty free time. No threats of reprisal, implied or expressed, were made because they pursued the contract grievance procedure. The teachers who filed the grievance were treated no differently than those who did not so file. There were no actions against their protected rights even if one concluded that the School District specifically responded to the filing of the grievance by changing the recess policy. The District had ample reason to desire the change; the arbitrator's award gave rise to the opportunity to effectuate that change.

Further, if the conclusion were drawn, in spite of the facts on the record, that there was an adverse effect on the teachers' rights, the employer sustained its burden and established a legitimate and substantial business justification for its action. The District's long standing concern with greater safety during recess, coupled with the teachers' availability serve to enforce such determination.

There is nothing in the record to indicate that the District's conduct was "inherently destructive" of important employee rights under the Great Dane principle, or that the District had antiunion motives.

CONCLUSION OF LAW

The Defendant, Butte School District No.1, did not violate 39-31-401 MCA.

RECOMMENDED ORDER

This unfair labor practice charge is hereby dismissed.

NOTICE

Exceptions to these findings of fact, conclusion of law and recommended order may be filed within twenty days of service. If no exceptions are filed, the recommended order will become the final order of this Board. Address exceptions to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59620.

Dated this 11th day of May, 1982.

BOARD OF PERSONNEL APPEALS

By _____
JACK H. CALHOUN
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 12th day of May, 1982:

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